

1 BUCHALTER NEMER
2 A Professional Corporation
3 JAMES B. WRIGHT (SBN: 63241)
4 RICHARD C. DARWIN (SBN: 161245)
5 333 Market Street, 25th Floor
6 San Francisco, CA 94105-2126
7 Telephone: (415) 227-0900
8 Facsimile: (415) 227-0770
9 jwright@buchalter.com

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11 Attorneys for Petitioner
12 BANK OF AMERICA, N.A.
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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

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19 BANK OF AMERICA, N.A., a national
20 banking association,

21 Petitioner,

22 vs.

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24 MICHELETTI FAMILY PARTNERSHIP,
25 a California Limited Partnership, ARTHUR
26 MICHELETTI, an individual, and JANICE
27 MICHELETTI, an individual,

28 Respondents.

CASE NO. CV 08-2902 JSW

29 **STIPULATION AND [PROPOSED]
30 ORDER PERMITTING DEPOSITIONS
31 TO PERPETUATE TESTIMONY
32 [F.R.C.P. 29(a)]**

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34 WHEREAS, Bank of America, N.A. (“Bank of America”) has filed a Petition To Compel
35 Arbitration in the above-captioned action against the Micheletti Family Partnership, Arthur
36 Micheletti, and Janice Micheletti (the “Petition”);

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38 WHEREAS, Respondent Arthur Micheletti has filed an action against Bank of America in
39 San Francisco Superior Court (the “State Action”);

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41 WHEREAS, Bank of America has filed a motion in the State Action to stay the State
42 Action, which is scheduled to be heard by the San Francisco Superior Court on October 16, 2008
43 (and which the parties have agreed to continue to October 23, 2008), and has also filed a motion
44 to compel arbitration in this Court, which is scheduled to be heard by this Court on October 17,
45 2008;

46 BN 2235288v6

1 WHEREAS, Arthur Micheletti has filed a motion in this Court to dismiss or stay the
 2 Petition, which is also scheduled to be heard by this Court on October 17, 2008;

3 WHEREAS, Arthur Micheletti and Bank of America have served notices and/or
 4 subpoenas for the depositions of Arthur Micheletti, Manlio Micheletti, Larry Johnston, and Don
 5 Miller (the "Subject Witnesses") in the State Action;

6 WHEREAS the Subject Witnesses are all over 75 years old;

7 WHEREAS, Bank of America, the Micheletti Family Partnership, Arthur Micheletti, and
 8 Janice Micheletti (collectively, "the Parties") recognize and agree that it would benefit all Parties
 9 and would serve the interests of justice to conduct expedited depositions to perpetuate the
 10 testimony of the Subject Witnesses;

11 NOW, THEREFORE, the Parties hereby agree and stipulate that the depositions of the
 12 Subject Witnesses may proceed in the State Action, unless and until this Court grants Bank of
 13 America's Petition to Compel Arbitration, in which case the Parties agree and stipulate that the
 14 depositions shall proceed in this federal action, until such time as an arbitrator has been appointed
 15 and has cleared conflicts. If and when an arbitrator has been appointed and has cleared all
 16 conflicts, the parties agree that if the depositions are not yet completed, they shall proceed in the
 17 arbitration proceeding without regard for whether the applicable arbitration rules and procedures
 18 provide for, or create a right to take, depositions;

19 The Parties further agree and stipulate that the sole purpose of the depositions taken
 20 pursuant to this Stipulation and Order is to preserve the testimony of the Subject Witnesses,
 21 taking into account their advanced age and the relevance of their testimony to the disputes set
 22 forth in the Petition, and that said deposition testimony may be used for all purposes as though
 23 taken in this federal proceeding, in any arbitration between or among the Parties and/or Larry
 24 Johnston (a party to the State Action and a Subject Witness), and/or in the State Action;

25 The Parties further agree and stipulate that permitting the depositions of the Subject
 26 Witnesses to be taken in the State Action is not, and will not be argued as, a basis for this Court's
 27 abstention or dismissal of the Petition under the doctrine set forth in *Colorado River Water
 28 Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

1 The Parties further agree and stipulate that by participating in the limited discovery
2 permitted by the terms of this Stipulation and Order to preserve the testimony of the Subject
3 Witnesses, Bank of America is not waiving its right to arbitrate the disputes set forth in the
4 Petition. Respondents Arthur Micheletti, Janice Micheletti and the Micheletti Family Partnership
5 agree and stipulate that they shall not argue or otherwise take the position that Bank of America
6 has waived its right to arbitrate by participating in the discovery set forth above.

7 DATED: October 2, 2008

BUCHALTER NEMER
A Professional Corporation

9 By: _____
10 
11 RICHARD C. DARWIN
12 Attorneys for Petitioner
13 BANK OF AMERICA, N.A.

14 DATED: October _____, 2008

KERR & WAGSTAFFE LLP

15 By: _____
16 JAMES M. WAGSTAFFE
17 Attorneys for Respondents
18 MICHELETTI FAMILY PARTNERSHIP,
19 ARTHUR MICHELETTI, and JANICE
20 MICHELETTI

ORDER

21 Pursuant to the Stipulation set forth above, and good cause appearing, IT IS SO
22 ORDERED.

23 DATED: _____

24 HON. JEFFREY S. WHITE
25 Judge of the United States District Court

1 The Parties further agree and stipulate that by participating in the limited discovery
2 permitted by the terms of this Stipulation and Order to preserve the testimony of the Subject
3 Witnesses, Bank of America is not waiving its right to arbitrate the disputes set forth in the
4 Petition. Respondents Arthur Micheletti, Janice Micheletti and the Micheletti Family Partnership
5 agree and stipulate that they shall not argue or otherwise take the position that Bank of America
6 has waived its right to arbitrate by participating in the discovery set forth above.

DATED: October , 2008

BUCHALTER NEMER
A Professional Corporation

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By

RICHARD C. DARWIN
Attorneys for Petitioner
BANK OF AMERICA, N.A.

DATED: October , 2008

KERR & WAGSTAFFE L.P.

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JAMES M. WAGSTAFFE
Attorneys for Respondents
MICHELETTI FAMILY PARTNERSHIP,
MURRAY MICHELETTI, and JANICE
MICHELETTI

ORDER

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Pursuant to the Stipulation set forth above, and good cause appearing, IT IS SO

ORDERED

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DATED: October 3, 2008

JUDGE JEFFREY S. WHITE
Judge of the United States District Court

BUCHALTER NAMER
A PROFESSIONAL CORPORATION
SAN FRANCISCO

BN 2235288v6

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CV 08-2902 JSW

STIPULATION AND ORDER PERMITTING THE PARTIES TO CONDUCT LIMITED DISCOVERY